No. 86-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KARL C. MERTZ,

Petitioner,

vs.

JOHN O. MARSH, Secretary of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. The opinion sought to be reviewed conflicts with the opinion of the Court of Appeals for the District of Columbia Circuit in Smith v. Heckler (No. 84-5724; unpublished Judgment and Memorandum, filed October 24, 1985).

2. Can the federal agency retaliate against petitioner and violate the Equal Employment Opportunity Commission's regulations and then deny petitioner attorney's fees when he retains counsel to defend himself against these acts?

3. Do the Equal Employment Oportunity Commission guidelines, which deny reasonable attorney's fees to a prevailing party, controvert the intent and policy of Congress as set forth in 42 U.S.C. § 2000e - 5(k) and Newman v. Piggie Park Enterprises, Inc. 290 U.S. 400 (1968) Albemarle Paper Co. v. Moody 422 U.S. 405, 415 (1975)?

PARTIES BELOW

The following were parties below:

Plaintiff-Appellant:

Karl C. Mertz;

Defendant-Appellee:

John O. Marsh, Secretary of the Army.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is officially reported at 786 F.2d. 3175 (11th Cir. 1986). A copy is appended as p. 1a.

The order of the Court of Appeals for the Eleventh Circuit denying petition for rehearing and suggestion for rehearing en banc, dated August 25, 1986, is appended as p. 18A.

The order of the United States District Court for the Northern District of Georgia is not officially reported. Civil Action No. C84-1616A dated March 18, 1985, was unofficially reported in 40 EPD Paragraph 36, 162. A copy is appended as p. 21a.

The order of the United States District Court for the Northern District of Georgia denying petitioner's motion to alter or amend dated May 11, 1985, was not

officially reported. A copy is appended as p. 33a.

The opinion of the Department of the Army, Office of the Assistant Secretary, Director, Equal Employment Opportunity, Compliance and Complaints Review Agency dated 29 June, 1984, was not officially reported but a copy if appended as p. 35a.

The decision of the Court of Appeals for the District of Columbia Circuit, Smith v. Heckler, No. 84-5724, filed October 24, 1985, was not published but a copy is appended as p. 39a.

JURISDICTION

Petitioner brought his action seeking an award of attorney's fees for services rendered representing a federal employee in his attempt to file complaints of discrimination under 42 U.S.C. § 2000(e) - 3(a). The complaints were settled in full by agreement prior to the filing of a formal complaint.

The action was brought pursuant to 42 U.S.C. § 2000e-16, and attorney's fees were sought under 42 U.S.C. § 2000e-16(d), which incorporates the provisions of 42 U.S.C. § 2000e-5(k).

The opinion of the United States Court of Appeals for the Eleventh Circuit, sought to be reviewed, was entered on April 22, 1986. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 25, 1986.

This Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. § 1254(i).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1254(1). A copy is appended as p. 53a.

42 U.S.C. § 2000e - 3(a). A copy is appended as p. 54a.

42 U.S.C. § 2000e - 5(k). A copy is appended as p. 56a.

42 U.S.C. § 2000e - 16. A copy is appended as p. 57a.

42 U.S.C. § 2000e - 16d. A copy is appended as p. 59a.

29 C.F.R. § 1613.213(a). A copy is appended as p. 60a.

29 C.F.R. § 1613.216(a). A copy is appended as p. 63a.

29 C.F.R. § 1613.261(a). A copy is appended as p. 66a.

29 C.F.R. § 1613.262(a)(b). A copy is appended as p. 67a.

29 C.F.R. § 1613.271. A copy is appended as p. 70a.

STATEMENT OF THE CASE

Petitioner, a civilian employee of the Department of the Army and the Headquarters Equal Employment Opportunity Manager, believing that he had been discriminated against in violation of 42 U.S.C. § 2000e - 3(a), attempted to consult with an Equal Employment Counselor by filing his written itemized complaints of discrimination with the next highest level Equal Employment Opportunity Officer (Command EEO Manager) on April 29, 1983, May 2, 1983, and again on July 13, 1983, requesting the assignment of a counselor (EEO Counselor) as required by 29 C.F.R. § 1613.213(a) (Exhibits 1, 3, 4 attached to petitioner's affidavit in support of Motion for Summary Judgment) (hereinafter referred to as petitoner's affidavit).

The Command EEO Manager brought the complaints to the attention of

Petitioner's Commanding Officer, who ordered his own Inspector General to investigate petitioner's allegations of discrimination and, among other things, "petitioner's loyalty to this organization." (Exhibits 5 and 7 attached to petitioner's affidavit.

The Command EEO Manager held the pre-complaint process in abeyance to determine whether the Inspector General's Investigation would bring "any discriminatory issues to our attention" and stated he did not consider petitioner's complaint to be a valid Title VII complaint and therefore did not process it. He further stated "Mertz (petitioner) must be crazy - filing a complaint against his boss. I wouldn't touch it with a ten-foot pole." (Exhibit 6 attached to plaintiff's affidavit; paras. 9 and 10 of petitioner's affidavit.)

On August 26, 1983, petitioner's supervisor withheld his step-in-grade increase pending the completion of the Inspector General's investigation. (Exhibit 7 attached to petitioner's affidavit.)

Petitioner then requested his Counsel to represent him especially at the interrogations by the Inspector General.

Upon advice of Counsel petitioner notified the Command EEO Manager that he considered the withholding of his pay increase to be a further act of reprisal and again requested the appointment of an EEO Counselor. (Exhibit attached to petitioner's affidavit.)

On September 2, 1983, petitioner's Counsel wrote petitioner's commanding officer protesting these acts of retaliation, reprisal and harassment and requested him to direct the Command EEO

Manager to process petitioner's complaint. (Exhibit 9 attached to petitioner's affidavit.)

Petitioner's commanding officer replied directly to petitioner stating he had no intention of halting the Inspector General's investigation and suggesting that petitioner consult the Civilian Personnel Officer concerning his appeal rights to appeal the denial of his step-in-grade pay increase. (Exhibit 10 attached to petitioner's affidavit.)

At the beginning of the interrogation by the Inspector General, petitioner's counsel objected to it on the grounds of reprisal for having attempted to file a charge and because petitioner was protesting employment practices made unlawful by Title VII. The Inspector General replied that he was advised that it was not reprisal and proceeded with the

interrogation. (Para. 22 and 23 of petitioner's affidavit.)

Petitioner was interrogated by the Inspector General on four (4) separate days for a total of thirteen (13) hours. At the last session petitioner was accused of two offenses, insubordination and malicious statements and was requested to sign a waiver. He refused. (Para. 27 of petitioner's affidavit.)

Petitioner's Counsel notified the Command EEO Manager in writing that he considered this and the other acts of the Agency to be retaliation and reprisal in violation of § 704(a) (42 U.S.C. § 2000e - 3(a)) of the Civil Rights Act of 1964, as amended and again requested him to follow the pre-complaint process. (Exhibit 12 attached to petitioner's affidavit).

Finally on September 16, 1983, the Command EEO Manager assigned an EEO

Counselor from another base to process petitioner's complaint. (Exhibit 14 and 15 attached to petitioner's complaint.)

On October 31, 1983, petitioner collapsed in the office and was taken to the hospital where he remained three days. (Para. 39 of petitioner's affidavit.)

Petitioner's request that his counsel participate in the settlement negotiations was ignored and then he was told that it would be inappropriate since the Agency was about ready to agree to all of petitioner's terms of settlement. (Exhibit 21 attached to petitioner's affidavit.)

On December 2, 1983, petitioner and his Counsel were notified that the EEO Counselors and the Agency had agreed upon a complete and full settlement of petitioner's complaints of discrimination and an award of reasonable attorney's

fees, and the Command EEO Manager told petitioner's Counsel that he could go home.

At the request of the Command EEO Manager, petitioner's Counsel submitted an affidavit itemizing his services from August 22, 1983, to and including December 2, 1983, for a total of 30.25 hours. (Exhibit 22 attached to petitioner's affidavit.)

The directives of the U.S. Department of the Army provide that if a complaint of discrimination is settled at the local level, costs and attorney's fees not exceeding Five Thousand ($5,000.00) Dollars may be paid without approval of the Department of the Army at Washington. (Exhibit 28 attached to petitioner's affidavit.)

The first draft of the settlement agreement prepared by the Agency's counsel

limited the amount of attorney's fees and stipulated that the issue of the Agency's authority to pay attorney's fees be settled by the Agency. (Exhibit 23 attached to petitioner's affidavit.)

The provisions limiting or denying attorney's fees were stricken from the draft agreement as being contrary to the oral settlement agreement reached December 2, 1983. (Exhibit 23 attached to petitioner's affidavit.)

Petititioner and his Counsel redrafted the agreement adding clauses giving further relief. (Exhibit 24 attached to petitioner's affidavit.)

The Agency's counsel redrafted petitioner's draft of the agreement and included all of the stricken provisions. The Command EEO Manager submitted it to petitioner with the statement, "It appears that this is all they will do," and he

urged petitioner to sign it. Without being able to have the agreement reviewed by his Counsel, petitioner signed the Agency's draft of the agreement, with the mistaken belief that there was no restriction on the unambiguous provision in the agreement that the Agency would pay reasonable attorney's fees in an amount not exceeding $3,000.00.

Petitioner brought suit in the United States District Court for attorney's fees under 42 U.S.C. § 2000e - 5(k) and then brought a cross motion for summary judgment which was denied, not because of 29 CFR § 1613.271(c)(1)(iv) but because of the terms of the settlement agreement which provided that the question of the authority to pay attorney's fees would be determined by the Department of the Army in Washington. (See Appendix p. 35a.)

Petitioner's motion to alter or ammend was denied. The Court of Appeals for the Eleventh Circuit affirmed on the basis of 29 CFR § 1613.271(c)(1)(iv) ruling in substance that Petitioner did not need an attorney in the pre-complaint process since it was not an adversarial proceeding.

REASONS FOR GRANTING THE WRIT

This petition presents three issues; one is whether the opinion, sought to be reviewed, conflicts with the opinion of the U.S. Circuit Court of Appeals for the District of Columbia Circuit?

The second issue is whether a federal agency may violate the regulations issued by the Equal Employment Opportunity Commission and commit acts of reprisal against petitioner and then take advantage of a technicality to deny petitioner attorney's fees when he retains counsel to defend himself against these violations and acts of reprisal which are in themselves further violations of 42 U.S.C. § 2000e 3(a)?

The third issue is, do the provisions of 29 C.F.R. § 1613.271(c)(i)(iv) under the facts of this case controvert the intent of Congress to award attorney's fees to the prevailing party?

I.

CONFLICTING OPINIONS OF CIRCUIT COURTS

We submit that the Court of Appeals for the Eleventh Circuit in the instant case has rendered a decision in conflict with the decision of the court of Appeals for the District of Columbia in Smith v. Heckler No. 84-5724 (unpublished Judgment and Memorandum filed October 24, 1985). (See Appendix p. 39a).

In the Smith case, the District of Columbia Circuit reversed the District Court and vacated its judgment denying attorney's fees for services rendered prior to the filing of a formal complaint. This District Court's decision was cited with approval by the Court of Appeals for the Eleventh Circuit in the instant case. Mertz v. Marsh, 786 F. 2d 1578 at p. 1580.

The Appellate Court in the Smith case

(supra) reasoned that the proceedings for which attorney's fees were sought, although rendered prior to the filing of the formal complaint, were proceedings mandated by the Agency and became part of the Title VII process and were therefore sufficiently linked to Title VII to be a proceeding "under" that statute for the purpose of 42 U.S.C. § 2000e-5(k) and that the defense to the proceedings that Smith retained counsel to make was in substance an EEO complaint. It alleged that the proposal against Smith in the proceedings discriminated against her. Smith v. Heckler, (supra p. 4).

The Agency argued in the Smith case that she had the option of waiting until she filed her Title VII claim to raise any issue of discrimination.

The Appellate Court rejected this argument as being a theoretical option and

held that the Agency could not reasonably expect "an employee (or conscientious counsel for an employee) to accept termination without raising what may be her strongest defense in the hope that the later formal Title VII process will rectify all." Smith v. Heckler, (supra p. 6).

We submit that the Smith facts are analogous to the facts in the instant case. Instead of mandating the proceeding, the agency here perpetrated the acts of reprisal and any prudent employee would retain counsel to protest and contest these acts which could lead to his immediate discharge.

The Court's attention is called to the provision of 29 CFR § 1613.261 which prohibit reprisal against the complainant at any time during the presentation of his complaint and the provisions of 29 CFR

§ 1613.262 which gives the complainant a choice of review procedures for complaints of reprisal. Petitioner and his counsel immediately protested in writing each act of reprisal by the Agency and except for the settlement agreement in which petitioner withdrew all charges, could have demanded a review of his charges of reprisal under this section.

It is submitted that the rationale behind 29 CFR § 1613.262 makes moot the provisions of 29 CFR § 1613.271(c)(1)(iv) in this case where the agency flagrantly committed acts of reprisal and other violations against petitioner who was attempting to follow the Title VII process mandated by the regulations.

II.

The Agency violated the Regulations presenting the pre-complaint process and committed acts of reprisal after

petitioner attempted to file a charge and protested violations of Title VII.

The regulations provide that the counselor must: (a) try to resolve the matter; (b) make whatever inquiry he believes to be necessary, (c) seek a solution on an informal basis, (d) counsel the aggrieved person concerning the issues, (e) submit a written report summarizing the counselor's actions and advice both to the agency and the aggrieved person, (f) conduct the final interview, not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. 29 C.F.R. § 1613.213(a)

Instead of following the regulations, the Command EEO Manager sent a copy of petitioner's complaint to petitioner's Commanding Officer. (Exhibit 5 attached to petitioner's affidavit.)

The regulations provide that the identity of the aggrieved person shall not be revealed except when authorized to do so by the aggrieved person. 29 C.F.R. § 1613.213(a).

On May 2, 1983, petitioner specifically requested in writing, "Please keep this MFR and my identity confidential as long as possible." (Exhibit 3 attached to petitioner's affidavit.)

Petitioner's Commanding Officer, instead of remanding the complaint to the Command EEO Manager with instruction to follow the regulations for pre-complaint processing, directed his Inspector General to conduct an investigation of the allegations of petitioner's complaint. (Exhibit 5 attached to petitioner's affidavit.)

Petitioner considered this to be an act of retaliation, intimidation and harassment. In the Army, an investigation

of a civilian employee by the Inspector General usually means discipline.

In the opinion sought to be reviewed, the Circuit Court remarked that petitioner had suggested that the non-EEO aspects of his complaints might be appropriate for examination by the Inspector General. Mertz v. Marsh 786 F.2d. 1581.

Petitioner's suggestion, however, was that the FORSCOM Inspector General (at the next highest level of command) and not his Commanding Officer's Inspector General might examine them. (Exhibit 4 attached to petitioner's affidavit.)

The regulations provide that the person assigned to investigate complaint of discrimination shall not be directly or indirectly under the jurisdiction of that part of the agency in which the complaint arose. 29 C.F.R. § 1613.216(a).

Petitioner's Commanding Officer indicated that the Inspector General was to investigate, among other things, petitioner's "loyalty to this organization." (Exhibit 7 attached to petitioner's affidavit.)

Petitioner considered this also to be an act of reprisal.

As the opinion, sought to be reviewed, states the Command EEO Manager expressed doubt to whether petitioner had alleged employment discrimination. Mertz v. Marsh (supra at p. 1581).

The pre-complaint process does not give this authority to the Command EEO Manager. The regulations provide that if an aggrieved person believes that he has been discriminated against, he is required to consult an EEO Counselor. 29 C.F.R. § 1613.213(a).

The Agency may not unilaterally

determine the validity of petitioner's complaint. Pettway v. American Cast Iron Pipe Co., 411 F.2d. 908 (5th Cir. 1969) at p. 1004-1005. This was also an act of reprisal.

Next, petitioner's Commanding Officer stopped petitioner's step-in-grade pay increase until after the Inspector General's investigation and a review of the results to determine "your loyalty to this organization." (Exhibit 7 attached to petitioner's affidavit.)

This was a flagrant act of reprisal which certainly had a chilling effect on petitioner's attempt to assert his legal right and is prohibited not only by 29 C.F.R. § 1613.216(a) but also in 42 U.S.C. § 2000e.3(a).

The opinion sought to be reviewed considered this act of reprisal "suspect but no more than that." Mertz v. Marsh

(supra at p. 1581).

During this time petitioner and then his Counsel kept protesting these acts of reprisal and violations of the pre-complaint process and demanding that the regulations be followed. Petitioner was given no relief but told he could consult his Civilian Personnel Officer for the procedures for appealing the denial of his pay increase. (Exhibits 8, 9, 10, 12 attached to petitioner's affidavit.)

The final straw came on the fourth day of petitioner's interrogation by the Inspector General when he was warned and then accused of insubordination and malicious statements, either of which acts would be grounds for immediate discharge. (Exhibit 11 attached to petitioner's affidavit.)

It is difficult to imagine a more flagrant act of reprisal than to be

accused of insubordination or malicious statement because you accuse your supervisor of discrimination, but the Circuit Court did not even mention it.

The opinion of the District Court and of the Court of Appeals did not consider these acts "pertinent" or "sufficient to support petitioner's contention." The opinion sought to be reviewed concluded that these acts were not adversarial and did not require the services of an attorney.

The matter of reprisal against a discriminatee was eloquently addressed by Chief Judge John R. Brown of the Fifth Circuit when he wrote:

> "There can be no doubt about the purpose of § 704(a) [42 U.S.C. § 2000e-3(a)]. In unmistakeable language, it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of

charges and take independent action. Pettway v. American Cast Iron Pipe Co., 411 F.2d.908 (1969) at p. 1004-1005.

Many Circuit Courts of Appeal have recognized the value of the attorney's services during the administrative process. See Parker v. Califano, 561 F.2d.320 (D.C. Cir. 1977).

The opinion, sought to be reviewed, did not appear to be greatly concerned about the acts of reprisal inflicted on petitioner. In fact, it had some problem indentifying the acts of reprisal contained in petitioner's memo of complaint. Mertz v. Marsh (supra at p. 1579). Attention is respectfully called to paragraph 2a-2i of petitioner's memo of complaint. (Exhibit 1 attached to petitioner's affidavit.)

In this paragraph petitioner lists some nine incidents which he alleges

constitute acts of reprisal because he protested practices made unlawful by Title VII. It is true that the details are not completely fleshed out, but all a charge or complaint must do is to give notice to the respondent and then he must be given an opportunity to explain them before any judgment is made.

The opinion sought to be reviewed makes the judgment of non-suit without opportunity of proof.

Given the Agency's posture in this case, it is certain that no settlement would have been obtained without the aggressive resistance of petitioner and his Counsel.

III.

THE INTENT OF CONGRESS

The more important question is, does this restriction on attorney's fees imposed by 29 CFR § 1613.271(c)(i)(iv)

nullify, in the instant case the intent of Congress to encourage the "private attorney general" to help administer Title VII by awarding attorney's fees to the prevailing party. See Albemarle Paper Co. v. Moody 422 U.S. 405, 415 (1975).

With respect to the federal employee, he is more than a "private attorney general." The actual Attorney General or his subordinates in the Department of Justice are in fact defending the federal employer, and he must file his complaint with the alleged discriminator instead of an independent agency. See Parker v. Califano 561 F.2d.334 (D.C. Cir. 1977).

And as the Court points out in Parker there is a strong relationship between the administration process and the judicial process. In fact, the Court concludes that one would not undertake the administrative process without a lawyer.

A Title VII plaintiff's lawyer is

finding it increasingly difficult to pursuade the Court to find in his favor and the doctrine of fee shifting is constantly being eroded. As Mr. Justice Brennan wrote in Evans v. Jeff D 106 S.Ct. 1531 (1986) a plaintiff's attorney must make a modest living to continue to serve his clients. He also cannot assist in the administration of Title VII unless given fair fee treatment by the courts.

CONCLUSION

For the foregoing reasons, this Court should issue the writ of certiorari, vacate the opinion below, and remand to the Court of Appeals for further consideration and the award of attorney's fees to petitioner.

Respectfully submitted,

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[786 F.2d 1578]

KARL C. MERTZ,

Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., Secretary of the Army,

Defendant-Appellee.

No. 85-8391

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

April 22, 1986.

Civilian equal employment opportunity manager at army base who had filed grievance asserting employment discrimination appealed from order of the United States District Court for the Northern District of Georgia, Horace T. Ward, J., ruling that he was not entitled to attorney fee. The Court of Appeals, Goldbold, Chief Judge, held that plaintiff was not entitled to attorney fee under Title VII.

Affirmed.

CIVIL RIGHTS Key 46(23)

Civilian equal employment opportunity manager at army base was not entitled to attorney fee under Title VII for legal services performed for him relating to his grievance asserting employment discrimination where grievance was settled without his filing a formal complaint. Civil Rights Act of 1964, §§ 706(k), 717(d), as amended, 42 U.S.C.A. §§ 2000e-5(k), 2000e-16(d).

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and ATKINS*, Senior District Judge.

GODBOLD, Chief Judge:

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Plaintiff Mertz claims an attorney fee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, for legal services performed for him relating to his grievance asserting employment discrimination. The grievance was settled without his filing a formal complaint.

We state the facts guardedly because, under the settlement agreement Mertz withdrew complaints against the Army and Army officers, and the Army agreed to remove adverse comments concerning Mertz from his personnel file.

Mertz is a civilian equal employment opportunity manager at an Army base. After first conferring with his private civilian counsel, he presented to the commander a long memorandum of grievances, suggestions and demands. These were then embraced in a memorandum that was filed

with the equal employment opportunity officer of the command, a civilian. The caption of the memorandum described it as comments concerning lack of support for and thwarting of affirmative action on the part of the Army officer under whose supervision Mertz worked and reprisals against Mertz because of his efforts to enforce laws and regulations against employment discrimination. Mertz made no assertion that he had been discriminated against because of race, color, religion, sex, or national origin; then and now his only assertions of discrimination against him concern alleged retaliation. The memo contained allegation of failure in the area of employment discrimination by the supervising Army officer and of actions by that officer impeding Mertz's efforts to prevent and eliminate discrimination. It is not possible to

identify precisely and to separate out matters described in the memo that are claimed to be retaliatory, acts simply charging failure of the Army to support equal employment opportunity, and acts depicting personal differences between Mertz and the supervising officer that might have no relation to discrimination. Included in the array of grievances and demands are proposals and demands addressed to the commander which under no theory could relate to alleged retaliation againt Mertz.[1]

[1] Such as a demand for increased funding for the equal employment opportunity office and a demand that the commander remove alleged instances of racial discrimination that Mertz states have occurred including, with respect to a named civilian employee nowhere else identified in the memo, that she be transferred to a non-supervisory position, and her alleged "racist/ discrimination behavior" be investigated. If racial discrimination existed at the post, it may have represented a command failure, but it was hardly discrimination directed at Mertz.

Mertz filed his memorandum with the command equal employment opportunity officer (a civilian) pursuant to 28 C.F.R. 1613.213, which provides for "precomplaint processing." This regulation sets out that an agency shall require that one who believes that he or she has been discriminated against must first consult with an equal employment opportunity counselor to try to resolve the matter. Mertz asked that a counselor be designated. He also stated in his cover letter that he would like to "move to withdraw" his "complaint," possibly even before the supervising officer knew of it.

Some two and a half months later Mertz wrote the equal employment opportunity officer to "continue processing" his complaint because things had not changed. He stated that he

wanted "those portions of (his) allegations not falling in the EEO arena" to be channelled to proper military authorities, possibly the inspector general. The commander ordered the inspector general to investigate. The equal employment opportunity officer notified Mertz that his complaint alleging discrimination was being held in abeyance pending the inspector general's investigation. This letter stated that if during the course of the investigation discrimination issues were brought to light the equal employment opportunity officer would pursue those issues in accordance with the applicable regulations. Mertz's attorney, with whom he had conferred before he ever made known his complaints, objected to the inspector general's investigation on the ground that it was a retaliation.

While this investigation was going on, the Army officer who was at the center of Mertz's complaints notified him that his in-grade step increase was being withheld pending completion of the inspector general's investigation, "in view of concerns regarding your effectiveness in your position of Equal Employment Manager and your loyalty to this organization." During the investigation, and presumably as an incident to this interrogation, Mertz was notified that he was a possible suspect on charges of insubordination and making of malicious statements. As the investigation went on, counsel for Mertz again insisted that an EEO counselor should be appointed and the informal complaint procedure moved forward. After a time a counselor was designated "to conduct the informal aspects of (Mertz's)

EEO complaint," and, after conferences between the commander, Mertz and the counselor, a settlement was reached. An agreement was signed that provided Mertz would dismiss all claims concerning discrimination. The agreement defined Mertz's role and responsibilities in his job. The Army agreed to grant Mertz his step increase retroactive to the date he was entitled to it. It agreed to close the inspector general's investigation without adverse findings against Mertz and to remove from Mertz's personnel file all derogatory information relating to his complaints. With respect to an attorney fee the settlement provided:

> The Agency shall pay reasonable attorney fees allowable in accordance with Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-16 and EEOC Regulation (sic) 29 C.F.R. § 1613.-217,271(c)(1)(2) and applicable case law in the amount no greater than three thousand dollars ($3,000.00),

such amount to be determined from the fee schedule, an itemized breakdown of fee charges, and other supporting documents submitted in strict accordance with 29 C.F.R. § 1613.271(c)(2) by Complaintant's attorney and attached hereto as Inclosure 1. Complainant and Agency agree and stipulate that the issue as to the Agency's authority to grant attorneys fees and the amount of attorney fees if any, which the Agency may legally pay shall be severed from and not otherwise affect the other provisions of this Settlement Agreement; and further, that any issue regarding either the authority to pay or the amount of fees payable shall be conclusively decided by Department of Army, Washington, D.C. SAMR-SFGR, using the procedures and guidance specifically set out in Message P281436Z dated January 1983, Subject: Guidance on Payment of Attorney Fees and Costs Pursuant to 29 C.F.R. § 1613, attached hereto as Inclosure 2.

29 C.F.R. § 1613.271(c)(iv) provides:

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he or she is represented by an attorney, except that the fees are allowable for a reasonable period of time prior to the notification of representation for any services

performed in reaching a determination to represent the complainant.

The Army denied a fee on the ground that under this regulation an attorney fee could be paid for only services performed after the filing of the formal complaint required by § 1613.214. Mertz then brought this suit against the Secretary, asserting that the Army erred in this conclusion. The Secretary responded with a denial and an affirmative defense of waiver based on paragraph 9 of the agreement. The district court ruled that the Army erred--that it was authorized to pay a fee for pre-complaint services--but that by the settlement agreement Mertz had agreed to accept the decision of the Army as final. It is at least open to serious question whether Mertz's alleged waiver would operate to leave in effect a decision by the Army if that decision was made

pursuant to an error of law. But we need not address this point because we conclude that the Army's decision that it lacked authority to pay a fee was correct.

Mertz sought a fee under 42 U.S.C. § 2000e-16(d), which incorporates, inter alia, the provisions of § 2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion may allow the prevailing party, other than the commission or the U.S., a reasonable attorney's fee as part of the costs...

In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980) the Court said that the word "proceedings" included state and federal, administrative and procedural proceedings and upheld an award of attorney's fees for services rendered in state administrative proceedings in

connection with an EEO charge. The Court noted with approval decisions by circuit courts upholding fee awards under § 2000-e5(d) for work done in federal administrative proceedings that must be exhausted as a condition to filing an action in federal court. 447 U.S. at 61-62, n. 2, 100 S.Ct. at 2029-30, n. 2. In Parker v. Califano, 561 F.2d 320 (D.C.Cir. 1977) the court upheld an award to a federal employee of attorney fees for time spent at both administrative and judicial levels in pursuing a Title VII claim that had been settled. The rationale of these cases is that services of an attorney at the administrative level are desirable and an integral part of the overall administrative-judicial scheme.

None of the foregoing cases involves services relating to pre-comlaint processing under § 1613.213.

The pre-complaint grievance level is different in purpose and nature from the post-complaint procedure. It is informal. The identity of the complainant is confidential. The grievance need not even be written. The counselor has a duty to give counsel as well as to seek a solution on an informal basis. If this first level stage does not bring the matter to solution, the aggrieved person must be notified of his right to file "a complaint of discrimination." Such a complaint, pursuant to § 1613.214, must be written and served upon various officials, and must be investigated. The investigator can administer oath, take statements of witnesses, may conduct hearings, make findings, and the agency decision is subject to appeal.

We agree with 29 C.F.R. § 1613.-271(c)(iv), which treats the pre-

complaint processing of a grievance as not a "proceeding" for which attorney fees may be granted. This drawing of a line between the ameliatory system of .213 and the formal complaint procedure of .214 is not contrary to the statutory provisions authorizing fees (in the discretion of the agency) "in any action or proceeding." See Smith v. Heckler, 35 Emp.Prac.Dec. (CCH) ¶ 34.-652 (D.Ct.D.C.,#CA-2976, Sept. 6, 1984).

> (T)here is simply no statutory authorization under Section 2000-e 5(k) for the payment of attorney's fees for work done in connection with adverse action or grievance proceedings which occur prior to the filing of a formal EEO complaint.

Mertz makes an alternative argument that in the particular circumstances he is entitled to a fee for work done by his attorney at the pre-complaint level

because the Army refused to treat his grievances as one alleging equal employment opportunity discrimination and declined to appoint a counselor and proceed with the procedures of § 1613.213 but rather subjected him to an inspector general's investigation.[2] We need not decide whether a fee may be allowed for services arising from an agency's refusal to entertain a grievance under § 1613.213. The facts do not support such a contention here. Mertz himself suggested that the non-EEO aspects of his memorandum might be appropriate for examination by the inspector general. The equal employment opportunity officer of the command expressed doubt whether

[2] Mertz does not contend a fee should be allowed under the proviso of .217(c)(iv) relating to "services performed in reaching a determination to represent (him)."

the memorandum alleged employment discrimination under the Act and stated his intent to process discriminatory allegations pursuant to the Act if they surfaced during the inspector general's investigation. The withholding of the step increase is suspect but no more than that. The allegations and demands not even arguably retaliatory were of such nature that a commander would have been derelict not to investigate them, and to withhold promotion of the complaining party pending the investigation was not unreasonable.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8391

Filed August 25, 2986

KARL C. MERTZ,

Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., Secretary of the Army,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION OR REHEARING EN BANC

(Opinion April 22, 11 Cir., 1986, F.2d).

GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and ATKINS*, Senior U. S. District Judge

* Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern District of FL., sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc,

and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

S/
United States Circuit Judge

REHG-6
(Rev. 6/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Ben H. Carter, Clerk

KARL C. MERTZ, Plaintiff	:	CIVIL ACTION
v.	:	
JOHN O. MARSH, JR., Secretary of the Army Defendant	:	FILE NO. C84-1616A

ORDER OF COURT

Plaintiff brings this action seeking an award of attorney's fees for time expended on the administrative settlement of an informal complaint of discrimination. This action is brought pursuant to 42 U.S.C. § 2000e-16(d), which incorporates, interalia, the provisions of 42 U.S.C. § 2000e-(k). Defendent has moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), arguing:

1. that plaintiff is barred from bringing this action because he has entered into a settlement agreement which covers the matter of attorney's fees raised in this case, and

2. that plaintiff has failed to state a claim under 42 U.S.C. § 2000e-16. Plaintiff has moved for summary judgment pursuant to Fed.R.Civ.P. 56 on the issue of whether plaintiff is entitled to recover attorney's fees for the services of his attorney rendered in his behalf during the administrative proceedings which culminated in a settlement agreement.

The court will consider matters outside the pleadings to resolve both motions pending before the court. Defendant's motion for judgment on the pleadings, therefore, shall be treated as one for summary judgment pursuant to

Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(c).[1] The court is then prepared to address the pending motions as cross motions for summary judgment.

BACKGROUND

Plaintiff is the Equal Employment Opportunity (EEO) Manager at Fort McPherson. On April 29, 1983, plaintiff filed an informal complaint of discrimination against his supervisor pursuant to 29 C.F.R. § 1613.213. Various events transpired thereafter which are not directly pertinent to the resolution

[1] Generally, when the court so converts a Rule 12(c) motion into one for summary judgment under Rule 56, all parties must be given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(c). However, the matters submitted in support of and opposition to plaintiff's motion for summary judgment have adequately and reasonably afforded the parties the opportunity to do so. Cf. Property Management & Investments, Inc. v. Lewis, 752 F.2d 599, 604-05 (11th Cir. 1985).

of the motions now before the court. Plaintiff, with the assistance of counsel, eventually negotiated a "Settlement Agreement" with Colonel Edward C. Hackney, plaintiff's commanding officer at Fort McPherson, who signed said agreement in his individual capacity and as representative of the Department of the Army. The Settlement Agreement provides in pertinent part:

> 9. The Agency shall pay reasonable attorney fees allowable in accordance with Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. ¶ 2000e-16 and EEOC Regulation 29 C.F.R. § 1613.217, 271(c)(1)(2) and applicable case law in the amount no greater than three thousand dollars ($3,000.00), such amount to be determined from the fee schedule, an itemized breakdown of fee charges, and other supporting documents submitted in strict accordance with 29 C.F.R. § 1613.271(c)(2) by Complainant's attorney and attached hereto as Inclosure 1. Complainant and Agency agree and stipulate that the issue as to the Agency's authority to grant attorney fees if any, which the

> Army may legally pay shall be severed from and not otherwise affect the other provisions of this Settlement Agreement; and further, that any issue regarding either the authority to pay or the amount of fees payable shall be conclusively decided by Department of the Army, Washington, D.C. SAMR-SF GR, using the procedures and guidance specifically set out in Message P281436Z dated January 1983, Subject: Guideance on Payment of Attorney Fees and Costs pursuant to 29 C.F.R. § 1613, attached hereto as Inclosure 2.
>
> 10. Complainant declares that he has had the opportunity to secure independent advice of legal counsel and that he has carefully read and reviewed this Settlement Agreement. The Complainant is fully aware and understands the contents of this Settlement Agreement and is executing this Settlement Agreement of his own free will and with a full understanding of his rights under the law.

Settlement Agreement (dated December 20, 1983), attached to Complaint as Exhibit 11. On January 11, 1984, plaintiff's counsel filed a petitition for attorney's fees with the Department of the Army pursuant to ¶9 of said settlement

agreement. At some time thereafter, said request for attorney's fees was denied by the Department of the Army.

DISCUSSION The exclusive judicial remedy for claims of discrimination based on race brought by federal employees is 42 U.S.C. § 2000e-16. Brown v. General Services Administration, 425 U.S. 820, 835 (1976). Therefore, the sole jurisdictional basis for plaintiff's claim for attorney's fees in this case is § 2000e-16. The attorney's fee provision of Title VII of the Civil Rights Act of 1964, as amended, is found at 42 U.S.C. § 2000e-5(k), which is made applicable to federal employees by 42 U.S.C. § 2000e-16(d). Defendant claims that plaintiff is entitled to attorney's fees, if at all, "only for services performed after the filing of the (EEO) complaint required in (29 C.F.R.)

§ 1613.214." 29 C.F.R. § 1613.271(c)(1)(iv). Defendent argues that since plaintiff never filed a formal EEO complaint (because the dispute was resolved after the filing of an informal complaint under 29 C.F.R. § 1613.213), he is not entitled to an award of attorney's fees.

The relevant attorney's fee provision states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs...

42 U.S.C. § 2000e-5(k). This provision authorizes a fee award to one who has obtained complete relief in administrative proceedings before filing a separate action in federal court. See New York Gas Light Club v. Carey, 447 U.S. 54, 66

(1980) (dicta) ("Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that (Title VII's) authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in (those) proceedings.") (emphasis added) (footnote omitted).

Notwithstanding 29 C.F.R. § 1613.271(c)(1)(iv), the court is of the view that since plaintiff's pre-complaint efforts, which ultimately lead to a settlement of the issue, were required and commenced pursuant to 29 U.S.C. § 1613.213, they qualify as a "proceedings under (Title VII)," the prerequisite for a fee award pursuant §§ 2000e-16(d) and 2000e-5(k). See New York Gaslight, 447 U.S. at 61 n.2. Therefore, plaintiff, if not otherwise barred, is entitled to

recover attorney's fees for his successful administrative resolution of an employment discrimination claim even though no formal complaint was ever filed. Moreno v. City and County of San Francisco, 567 F. Supp. 458 (N.D.Calif. 1983).

However, this does not end the matter because defendant has raised the issue of the settlement agreement, particularly paragraph 9 of said agreement, as a bar to any litigation of the issue of plaintiff's claim for attorney's fees. The court notes the important public policy served by encouraging and enforcing the voluntary settlement of disputed claims. See, e.g., Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983); Garvin v. United States Postal Services, 553 F. Supp. 684 (E.D.Mo. 1982). See also 42

U.S.C. § 2000e-5(b) (a goal of Title VII is to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation an persuasion").

Based on the record before the court, it is apparent that the parties agreed that the matter of attorney's fees "shall be conclusively decided by the Department of the Army." Settlement Agreement, at ¶19 (emphasis added). Plaintiff alleges that he was not fully informed of the procedures the defendant would use in determining his award of attorney's fees and that agents of the defendant acted in bad faith in the negotiation and the carrying out of said provision. Defendant responds that plaintiff's allegations that he was fraudulently induced into signing the settlement agreement must be taken to

be inherently incredible. The court need not address defendant's contention.

Plaintiff had an opportunity to review paragraph 9 of the settlement agreement with his attorney prior to consenting thereto. See Affidavit of Karl C. Mertz at ¶53. Plaintiff's misunderstanding as to the nature of what he agreed to does not provide the court with sufficient basis to set aside the settlement agreement. Having agreed to permit the Department of the Army's decision to be "conclusive," the plaintiff may not now seek to invoke this court's jurisdiction to award an attorney's fee pursuant to 42 U.S.C. § 2000e-16.

For the foregoing reasons, plaintiff's motion for summary judgment is DENIED. Additionally, defendant's motion for judgment on the pleadings,

converted by the court to a motion for summary judgment is here GRANTED.

SO ORDERED, this 18th day of March, 1985.

S/HORACE T. WARD
HORACE T. WARD
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Luther D. Thomas, Clerk
Ben H. Carter, Deputy Clerk

KARL C. MERTZ, Plaintiff	:	CIVIL ACTION
v.	:	
JOHN O. MARSH, JR., Secretary of the Army Defendant	:	FILE NO. C84-1616A

ORDER OF COURT

Plaintiff has moved for reconsideration of this court's order entered on March 19, 1985. Plaintiff also seeks to have the court vacate judgment entered thereon. The court will treat the "motion for reconsideration" as a timely filed motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59(e).

The court remains convinced of the correctness of its legal conclusion that, under the facts of this case, plaintiff may not invoke this court's jurisdiction

pursuant to 42 U.S.C. § 2000e-16 to review agency action which plaintiff asserts is contrary to law. Accordingly, plaintiff's motion to alter or amend judgment is DENIED.

SO ORDERED, this 14 day of May, 1985.

S/HORACE T. WARD
HORACE T. WARD
UNITED STATES DISTRICT COURT

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

29 JUN 1984

SFGH

SUBJECT: Attorney Fees - Dr. Karl Mertz

Commander
US Army Forces Command
ATTN: AFPR-EE
Fort McPherson, Georgia 30330

1. Reference letter, AFZK-JA, Headquarters, Fort McPherson, 20 April 1984, subject as above.

2. Referenced letter forwarded an attorney's fees claim in the equal employment opportunity (EEO) complaint of Dr. Karl Mertz for a determination as to the authority of the Department of Army (DA), to pay attorney's fees and the amount of attorney's fees, if any, which can be

paid to the complainant's attorney under the present circumstances. Subject letter indicated that all issues, except the question of attorney's fees, were resolved in a settlement agreement reached during the precomplaint counseling of Dr. Mertz' case. So, the attorney's fees issue was severed from the settlement agreement and referred to DA for action pursuant to DA message, P 281436Z, dated January 1983, subject: Guidance on Payment of Attorney's Fees and Costs Pursuant to 29 CFR 1613.

3. Section 1613.271(c)(1)(iv) provides that attorney's fees shall be paid only for services performed after the

filing of the complaint required in section 1613.214. Section 1613.214 concerns the filing and presentation of the formal complaint of discrimination. The record indicates that the settlement of Dr. Mertz' EEO complaint was reached during the informal pre-complaint processing of his case. So, the regulations preclude an award of attorney's fees and costs to Dr. Mertz because the legal services were performed prior to the filin of a formal complaint of discrimination under section 1613.214. In addition, since the regulations specifically preclude an award of attorney's fees and costs during the informal stage of complaint processing, the agency is not obligated to issue a final decision under

section 1613.221(d) at this stage concerning claims of attorney's fees and costs. The aforecited comments were discussed with and concurred in by officials of the Guidance Division, Office of Legal Counsel, Equal Employment Opportunity Commission.

4. The claim for attorney's fees and costs with supporting documents, in subject complaint are enclosed.

FOR THE DIRECTOR OF EQUAL EMPLOYMENT OPPORTUNITY:

S/Dolores C. Symons

Director, Equal Employment Opportunity
Compliance and Complaints Review Agency

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5724 September Term, 1985
Civil Action 83-02976

Christine L. A. Smith, Appellant

v.

Margaret M. Heckler
Secretary, Health & Human Services

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, GINSBURG, and BORK, Circuit Judges

J U D G M E N T

This case was heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel for the parties. The court has considered the issues presented and, because the case appears to be "sui generis," finds no

occasion for a published opinion. See D.C. Cir. R. 13 (c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment from which this appeal has been taken is vacated and the case is remanded for further proceedings consistent with this court's memorandum. It is

FURTHER ORDERED, by this Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This intruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

S/George A. Fisher
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 84-5724, Smith v. Heckler

MEMORANDUM

Plaintiff-appellant Christine Smith is a federal sector employee. She seeks to recover attorney fees for legal services relating to her claim that, in charging her with inefficiency and falsification of records, and proposing her removal, the agency at which she was employed (Saint Elizabeth's Hospital) had engaged in race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, § 717, 42 U.S.C. § 2000e-16 (1982). Eventually, Smith's discrimination complaint was settled at the administrative level by an agreement that included a provision awarding attorney fees to her in accordance with applicable law.

A portion of the requested fees was

undisputed and has been paid. The undisputed portion covered 38.1 hours of service: three in an initial determination by the attorney whether to undertake the representation, and 35.1 in representing Smith from and after the date of which she filed her formal Title VII Equal Employment Opportunity (EEO) complaint. The disputed portion includes 5 hours spent in pursuing a standard employee "grievance," and 69.2 hours devoted to an "adverse action" proceeding. Smith unsuccessfully sought compensation for the "grievance" and "adverse action" representation, first by application to her agency, next, on appeal to the Equal Employment Opportunity Commission (EEOC) and, thereafter, in the district court.

We here review the district court's determination, on cross motions for

summary judgment, that only the undisputed portion (38.1 hours) could be attributed to an "action or proceeding under (Title VII)." In the district court's judgment, neither the grievance nor the adverse action proceeding was centrally linked to the EEO enforcement scheme, so as to quality legal services in those proceedings for an award under the governing statute, 42 U.S.C. § 2000e-5(k)(1982).[1] We agree as to the "grievance" but disagree as to the "adverse action" representation. The discrimination charge asserted in the adverse action proceeding, we hold, was pivotally linked, by the employing

[1] 42 U.S.C. § 2000e-16(d), which governs the award of attorney fees to federal employees in Title VII suits, incorporates 42 U.S.C. § 2000e-5(k) by reference.

agency's own rules, to the EEO complaint. We therefore vacate the summary judgment entered for defendant-appellee Secretary of Health and Human Services, and remand with instructions to enter judgment for Smith covering the hours reasonably devoted to opposing, on grounds of discrimination, the proposed "adverse action."

The grievance procedure, as the district court correctly observed, was in no sense integral or prerequisite to Smith's Title VII complaint.[2] Indeed, defendent-appellee has noted that Office of Personnel Mangement regulations precluded use of the grievance mechanism for allegations of race or sex discrimination. See Brief for Appellee

[2] Smith invoked the grievance procedure, then dropped it (by filing her EEO complaint) within a three-month span, without any action having been taken on the grievance.

at 10 n.7; 5 C.F.R. § 771.108(b)(1) (1979) (grievance procedure not available for matter administratively reviewable outside agency); 42 U.S.C. § 2000e-16(c) (1976 & Supp. III 1979) (agency EEO decisions reviewable by EEOC). In short, the conclusion is inescapable that fees for the grievance procedure are outside the ambit of § 2000e-5(k). We therefore turn from this clear issue to the matter genuinely in contention.

At the outset, we note that plaintiff-appellant Smith's case arose when the EEO enforcement regime for federal employees was in a transitional state. Counsel for defendant-appellee candidly represented to the court at oral argument that, once the Civil Service Reform Act of 1978 was securely in place, attorney fees could be recovered for representation of the character Smith

received when she resisted the proposed "adverse action" on grounds of discrimination. Counsel further acknowledged that "this case may be sui generis," for it involved an uncommon arrangement that has now passed entirely from the scene.

This uncommon arrangement consisted of an internal rule adopted by the Department of Health and Human Services (HHS) to supplement the Code of Federal Regulations. The rule provided that when, prior to a final decision on a proposed adverse action, an employee challenged the proposal as discriminatory, the agency would hear the challenge in the adverse action hearing, not in a Title VII hearing. When Smith's attorney first asked to file a Title VII claim, prior to the adverse action hearing, the agency referred him to this

rule and told him that he would have to wait until after the upcoming hearing.

We hold that in these circumstances the hearing was sufficiently linked to Title VII to be proceeding "under" that statute for the purposes of 42 U.S.C. § 2000e-5(k). The defense to the adverse action that Smith retained counsel to make in the hearing was in substance an EEO complaint; it alleged that the proposal of adverse action discriminated against Smith on the basis of her race and sex. Indeed, Smith's attorney would have preferred to bring the change under a Title VII rubric.

The charge of discrimination made in the hearing was in form a defense to an adverse action, rather than a Title VII complaint, only because the agency's own rule linked the two processes. At the time of the hearing, EEO regulations

required agencies to create their own procedures to handle Title VII claims. See 29 C.F.R. § 1613.212 (1979). HHS chose to respond to this requirement, in part, by the rule in question, which provided that adverse action hearings would consider both standard personnel concerns and discrimination claims. Thus, at this early stage of the complaint, the agency's own regulations tied together the personnel decisions process and the discrimination relief process in the same hearing and thereby "integrally connected" the hearing to Title VII for purposes for the award of attorney fees. See Kulkarni v. Alexander, 662 F.2d 758, 766 (D.C. Cir. 1978). Cf. Eatmon v. Bristol Steel & Iron Works, 769 F.2d 1503, 1519 (11th Cir. 1985) (awarding attorney fees for action to enforce executive order

conciliation agreement because release of Title VII claims in the agreement made the action one brought under Title VII).

Defendant-appellee argues that the personnel decision process and th Title VII process are not so closely linked because Smith had the option of waiting until she had filed her Title VII claim to raise any issue of discrimination. We reject this argument because the "option" that defendant describes is theoretical only: defendant could not reasonably expect an employee (or conscientious counsel for an employee) to accept termination without raising what may be her strongest defense, in the hope that the later formal Title VII process will rectify all. Cf. Bethel v. Jefferson, 589 F.2d 631, 644 (D.C. Cir. 1978) (agency's procedural restrictions

on access to its antidiscrimination mechanism must be reasonable).[3]

We hold that an agency may not place the Title VII claimant in such an untenable position; it may not effectively require an aggrieved employee to air her Title VII charge before her formal Title VII complaint and at the same time deny her the attorney fees that

[3] Defendant also argues that 29 C.F.R. § 1613.271(c)(1)(IV)(1980), on which the EEOC relied in denying these fees, is a valid and applicable regulation. We decline retroactively to apply this regulation, created in 1980, to events in 1979 because the injustice involved in retroactive denial of these fees outweights whatever interest the agency may have in applying it to this single "sui generis" case. See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). In light of the general abandonment of the uncommon arrangement involved here, we intimate no opinion as to the continued validity of this regulation.

she could have recovered but for that requirement. For this reason, we vacate the judgment from which this appeal has been taken and remand the case. On remand, the district court should award fees to Smith for all the hours reasonably dedicated to challenging the adverse action on grounds of discrimination.

28 U.S.C. § 1254

AN ACT

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

42 U.S.C. § 2000e-3.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e - 5(k)

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

U.S.C. § 2000e-16.

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of

Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. §2000e-16.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

29 C.F.R. § 1613.213.

(a) An agency shall require that an aggrieved person who believes that he or she has been discriminted against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter, to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and when advised that a complaint of discrimination has been accepted from an aggrieved person to submit a written report to the Equal

Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advise both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar

days after receipt of the notice of the appropriate official with whom to file a complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person. (Subparagraph (a) of section 1613.213 reads as amended on an interim basis per 45 F. R. 24131, effective April 11, 1980.)

29 C.F.R. § 1613.216.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of a complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment

of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term

"investigative file" shall mean the various documents and information acquired during the investigation under this section--including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from records, policy statements, or regulations of the agency--organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

29 C.F.R. § 1613.261.

(a) Complainants, their representatives, and witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 1613, or any time thereafter.

(¶4114.262)

29 C.F.R. § 1613.262.

(a) Choice of review procedures. A complainant, his representatives, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 1613.211 through 1613.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination, or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 1613.214 (a)(2) within 15 calendar days of the date of the

alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(b)(2) When a complainant, after completion of the investigation of his complaint under § 1613.216, requests a hearing and in connection with that complaint alleges restraint, interference,

coercion, discrimination, or reprisals, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency to further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

29 C.f.R. § 1613.271.

(c) Attorney's fees or costs.

(1) Awards of attorney's fees or costs. Th provisions of this Subpart relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16 except that no award of attorney's fees shall be made with funds appropriated under Pub. L. 95-391, the Legislative Branch Appropriation Act of 1979. In a decision by an agency, under § 1613.217, § 1613.220(d), § 1613.221 or § 1613.612 or by the Commission, under § 1613.234 or § 1613.262 or § 1613.631(a)(3), the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the

complaint or charge. (i) A finding of discrimintion raises a presumption of entitlement to an award of attorney's fees. (ii) Any award of attorney's fees or costs shall be paid by the agency. (iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government. (iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he or he is represnted by an attorney, except that the fees are allowable for a reasonable period of time prior to the notification of representation of any services performed in reaching a determination to represent

the complainant. Written submissions to the agency which are signed by the representative shall be deemed to constitute notice of representation.